Supreme Court, U.S.
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No. 92-1744

In The

Supreme Court of the United States

October Term, 1992

WOOD COUNTY, TEXAS, SHERIFF FRANK WHITE, and DEPUTY JAMES ROBERTS,

Petitioners,

v.

LARRY PEMBROKE, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. Whether the plaintiff class of prisoners' success in causing defendants to institute a total reform of the Wood County jail, in the absence of other formal relief, entitles the plaintiff class to prevailing party status for purposes of awarding costs and attorney fees pursuant to 42 U.S.C. § 1988?

LIST OF PARTIES

1. Wood County, Texas, Petitioner
2. Sheriff Frank White, Petitioner
3. Deputy James Roberts, Petitioner
4. Larry Pembroke on behalf of a class of all persons incarcerated in the Wood County jail from December 20, 1985, Respondents
5. Timothy B. Garrigan, Counsel for Respondents
6. Curtis B. Stuckey, Counsel for Respondents
7. Charles Clark, Counsel for Petitioners
8. Rick Faulkner, Counsel for Petitioners
9. John Alexander, Counsel for Petitioners

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

Petitioners appeal from the judgment and unanimous opinion of the United States Court of Appeals for the Fifth Circuit reported at *Pembroke v. Wood County, Texas*, 981 F.2d 225 (5th Cir. 1993), a copy of which appears in the petitioners' Appendix A. The trial court, the United States District Court for the Eastern District of Texas, Hon. Robert Parker, Chief Judge, presiding, did not issue a published opinion. The district court did enter Findings of Fact and Conclusions of Law and an Order denying

respondents prevailing party status, which are included in petitioners' Appendices B and C, respectively.

STATEMENT OF THE CASE

On December 20, 1985, plaintiffs, Dennis McKeever and Trent Commander, prisoners in the Wood County jail, brought this action on their own behalf and on behalf of a class of all persons held prisoner in the Wood County jail at that time or since. Plaintiff prisoners sought to improve conditions in the Wood County jail, as well as damages in their individual capacities.

Proceeding under 42 U.S.C. § 1983, plaintiffs asserted that jail conditions and treatment of prisoners violated rights guaranteed by the First, Fourth, Eighth and Fourteenth Amendments to the United States Constitution.

On August 20, 1986, the district court certified the plaintiff class. Thereafter discovery was cut off on March 30, 1987 and trial commenced eleven months later on February 22, 1988. Plaintiff Commander's individual claims were dismissed due to his non-appearance. Plaintiff McKeever's damage claim was tried to a jury while claims for classwide relief were tried to the district court.

Notwithstanding overwhelming evidence of egregious conditions of confinement and subconstitutional treatment of prisoners in the Wood County jail, the defendants steadfastly denied that their conduct was in violation of constitutional standards. Evidence at trial convinced the district court that class members were occasionally subjected to overcrowding; classification of prisoners was inadequate, including that pretrial

detainees were not segregated from convicted felons; reading materials were restricted to one Bible; class members were denied access to a law library for seven months; and a class representative had been placed in punitive isolation without due process protections. *See* Findings of Fact and Conclusions of Law, Findings of Fact Nos. 10, 11, 12, 16 and 17, petitioners' Appendix B.

Other evidence at trial, not mentioned by the district court but recognized by the Fifth Circuit, indicated

> The facility was in a general state of disarray. Administration of the facility had been delegated to untrained staff members; repeated state standards violations were never recorded or addressed; medical attention was erratic; and plumbing was in a constant state of disrepair resulting in raw sewage overflowing the showers and toilets for months at a time. The jail was always in semi-darkness in violation of state lighting standards. Visitation privileges were arbitrarily restricted. The prisoners were sometimes sprayed with mace as a form of punishment.

Pembroke v. Wood County, Texas, 981 F. 2d at 227. The Fifth Circuit also recognized that the district court understated the petitioners' classification and disciplinary infirmities; the petitioners commonly used punitive isolation without due process protections on other class members, and there was absolutely no classification system in effect. *Ibid.* 981 F.2d at 229.

At trial the defendants and their witnesses attempted to deny any constitutional infirmities, even in the face of jail records and their own deposition testimony to the contrary.

Evidence did demonstrate the defendants implemented many corrections and improvements after this litigation commenced: lighting systems were repaired; plumbing problems were corrected; dental care was expanded to include fillings, not just extractions; medications were secured away from trustees; general reading material was permitted; visitation hours and facilities were expanded; additional telephone equipment was installed for use by class members; and prisoners were permitted to use the law library. The defendants presented largely unscrutinized evidence of an overhaul of jail procedures which took place after the discovery cutoff in the months prior to trial.

At the conclusion of evidence, the district court announced, for the benefit of appellate courts, that "reasonable minds could not differ but under the facts of this case the facts constituted a violation of minimum constitutional standards," specifically mentioning three discrete constitutional violations: denial of access to a law library; inadequate classification; and punitive isolation without due process. (Trial transcript at p. 658) Plaintiffs' motion for a directed verdict regarding plaintiff McKeever's damage claim was denied at trial, despite the trial court's announcement of these three discrete constitutional violations.

The jury returned a verdict for the defendants on plaintiff McKeever's damage claim. Plaintiffs' motion for judgment notwithstanding the verdict was denied (again despite the trial court's announcement of three discrete constitutional violations). Plaintiff McKeever's death precluded appeal of the district court's denial of motions for a directed verdict and for judgment notwithstanding the

verdict. Pembroke was substituted as class representative.

Initially, the district court entered judgment for the defendants on all claims, including the class' equitable claims, without entry of Findings of Fact or Conclusions of Law. On appeal, the Fifth Circuit vacated the judgment and remanded for entry of Findings of Fact and Conclusions of Law in an unpublished decision dated July 5, 1989.

On remand the district court entered Findings of Fact and Conclusions of Law and Final Judgment, consistent with its initial Judgment, dismissing all of the plaintiff class' claims and decertifying the class. The trial court denied a motion for costs and attorneys' fees because the petitioners had begun planning a new jail prior to this lawsuit. However, the court did not consider the improvements at the Wood County jail still being used at the time of trial. The plaintiff class appealed the Final Judgment and the Findings of Fact and Conclusions of Law as well as the Order denying costs and attorneys' fees. The appeals of these issues were consolidated as docket number 92-4079 by the Fifth Circuit.

The Fifth Circuit, utilizing the clearly erroneous standard, upheld the district court's exercise of discretion to deny formal relief on the basis of mootness.[1] However, the Fifth Circuit did find the district court's denial of

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[1] Both the district court and the Fifth Circuit agreed that even declaratory relief could be denied, despite the Supreme Court's instructions to the contrary in *Quern v. Mandley*, 436 U.S. 725, 98 S.Ct. 2068, 2074 n.7, 56 L.Ed.2d 658 (1978).

prevailing party status and therefore denial of costs and attorneys' fees to be clearly erroneous:

> Although we give great deference to the district court's factual findings, we are left with the definite and firm conviction that a mistake has been committed.

Pembroke, 981 F.2d at 230. More specifically, the Fifth Circuit recognized that by the time of the February, 1988 trial "most if not all of the complained of conditions had been remedied," noting the appearance of a new jail administrator and total reform of the facility in 1987 during the months before trial. *Ibid.* at 227. Most importantly, the Fifth Circuit stated, "The record supports the inescapable conclusion that these improvements were caused by the plaintiffs filing suit." *Ibid.* at 230. Applying the Fifth Circuit's "catalyst" test for determining prevailing party status, as recently stated in *Associated Builders & Contractors of Louisiana, Inc. v. Orleans Parish School Board*, 919 F.2d 374, 378 (5th Cir. 1990), the Fifth Circuit concluded the plaintiff class accomplished the goal of this litigation, improving conditions of confinement at the Wood County jail and are, therefore, entitled to prevailing party status under 42 U.S.C. § 1988.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI DO NOT INCLUDE THIS CASE.

This case simply does not fit within any of the considerations governing review on *certiorari* described in

Rule 17, Rules of the Supreme Court of the United States. Petitioners concede the question presented has been decided in the affirmative by the courts of appeals. Petition at p. 7. There is no relevant conflict in the courts below. There has been no departure from the usual course of judicial proceedings. As demonstrated below, there is no important question of federal law which has not been settled by the Supreme Court.

II. THE ISSUE WAS CORRECTLY DECIDED BY THE FIFTH CIRCUIT, CONSISTENT WITH SUPREME COURT PRECEDENT.

The Fifth Circuit determined, and petitioners do not contest, that the purpose of respondents' lawsuit was the improvement of the conditions of confinement for members of the plaintiff class, and that that goal was accomplished as a result of this lawsuit. *Pembroke*, 981 F.2d at 230. Under settled law, as recently stated by the Fifth Circuit in *Associated Builders*, 919 F.2d 374, the court of appeals below conferred prevailing party status on the respondents, in the absence of formal relief, for purposes of awarding costs and attorneys' fees pursuant to 42 U.S.C. § 1988. As petitioners concede, beginning with the First Circuit in *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978), the courts of appeals which have considered the issue have developed similar and consistent "catalyst" tests for conferring prevailing party status on civil rights plaintiffs in the absence of formal relief. Petition at p. 8.

Petitioners' implications to the contrary notwithstanding, the Supreme Court has visited this issue and approved of awarding attorneys' fees in the absence of

formal judicially mandated relief. The Supreme Court noted in *Maher v. Gagne*:

> Nothing in the language of § 1988 conditions the District Court's power to award fees on . . . a judicial determination that the plaintiff's rights have been violated. Moreover the Senate Report expressly stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights . . . **without formally obtaining relief**.

448 U.S. 122, 129, 100 S.Ct. 2570, 2575, 65 L.Ed.2d 653 (1980) (emphasis added) (citations omitted).

Even more to the point, the Supreme Court more recently stated:

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment – e.g. . . . a change in conduct that redresses the grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.
>
> . . .
>
> [I]f the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed. **That** is the proper equivalent of a judicial judgment . . .

Hewitt v. Helms, 482 U.S. 755, 760-761, 107 S. Ct. 2672, 2676, 96 L.Ed.2d 654 (1987) (emphasis in original). It is hard to imagine how the Supreme Court could have more

clearly guided the Fifth Circuit to its conclusion that the plaintiff class is a prevailing party in this case.

Petitioners refer to language from *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 791, 109 S. Ct. 1486, 1493, 103 L.Ed.2d 866 (1989), as establishing a minimum threshold a plaintiff must reach in order to be considered a prevailing party:

> The plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant.

Ibid. However, petitioners are relying on an overly restrictive use of the term "legal relationship" when they urge that respondents have not reached this threshold. As the Fifth Circuit has recognized and petitioners do not dispute, petitioners resolved their dispute with the plaintiff class by changing their conduct, in many instances to comply with well settled constitutional standards, thus mooting the class' claims. *Pembroke*, 981 F.2d at 228-229. It is certainly difficult to imagine a more dramatic or significant change in a legal relationship than citizens bringing errant governmental officials into compliance with fundamental constitutional standards as is undisputedly the case here.

Finally, petitioners argue *Estate of Farrar v. Hobby*, ___ U.S. ___, 113 S.Ct. 566, 574 (1992), is inconsistent with the rationale of the Fifth Circuit's *Associated Builders* opinion and apparently the rationale of all of the other courts of appeals which have adopted "catalyst" tests for determining prevailing party status. Petitioners are clearly attempting to apply *Farrar* out of context.

As petitioners recognize, the Fifth Circuit in *Pembroke* explicitly distinguishes *Farrar*:

> *Farrar* dealt with prevailing party status and the award of attorney's fees in the context of nominal damages and is thus distinguishable from the present case.
>
> . . . Unlike *Farrar*, changes in the legal relationship between the plaintiffs and defendants in this case were wrought by the bringing of the litigation itself, not with recovery of monetary damages.

Petition at p. 12, referring to *Pembroke*, 981 F.2d at 231, note 27.

In *Farrar* the Court held that any formal relief, even if *de minimus*, was sufficient to confer prevailing party status. *Farrar*, 113 S.Ct. at 574. However, *Farrar* does not consider whether a plaintiff obtaining substantial relief in the absence of formal relief should be denied prevailing party status. Petitioners' reliance on *Farrar* is therefore misplaced. The Fifth Circuit's opinion below in *Pembroke* is consistent with *Farrar*.

CONCLUSION

For the reasons stated above, the petition for *certiorari* should be denied.

May 19, 1993

Respectfully submitted,

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